

**Vanalco, Inc. and Vernon Rasmussen, Petitioner
and United Steelworkers of America, AFL-
CIO, CLC.** Case 36-RD-1428

November 18, 1994

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

The National Labor Relations Board, by a three-member panel, has considered challenges and an objection to an election held on October 13, 14, and 15, 1993, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 245 for, and 250 against, the Union, with 11 challenged ballots, a sufficient number to affect the results.¹ The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings² as modified,³ and his recommendations.

The Board has long held that an employee on sick or disability leave is presumed to be eligible to vote absent an affirmative showing that the employee has resigned or been discharged. See, e.g., *Wright Mfg. Co.*, 106 NLRB 1234, 1236-1237 (1953); *Foley Mfg. Co.*, 115 NLRB 1205, 1206 (1956); *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Thorn Americas, Inc.*, 314 NLRB 943 (1994). At the same time the Board has found that an employee who is laid off is presumed eligible unless the employee has no reasonable expectation of recall. See, e.g., *Waterman Steamship Corp.*, 78 NLRB 21, 24 (1948). Our dissenting colleague urges that we apply the same test to employees on sick or disability leave that we apply to laid-off employees. Since layoffs can range from very temporary to permanent, that test is necessary to determine the nature of the layoff. We do not believe that such a test, with the additional litigation it requires,⁴ is warranted regarding employees on sick or disability leave. Rath-

¹ The hearing officer stated that the parties had agreed that Tom Jones and Jerome Bendel were ineligible to vote and that Michael Johnson was eligible to vote and his ballot should be counted. No exceptions were filed to this finding.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

³ With respect to the Employer's objection, we adopt the hearing officer's finding that Mac Johnson was eligible to vote and that, therefore, his voting was not objectionable conduct. We find it unnecessary to pass on the remainder of the hearing officer's discussion of the objection.

⁴ See *Whiting Corp.*, 99 NLRB 117, revd. 200 F.2d 43 (7th Cir. 1952), quoted in *NLRB v. Newly Weds Foods*, 758 F.2d 4, 8 (1st Cir. 1985) (Breyer, J.) (need to avoid "endless investigation into states of mind or of future prospects.")

er, in our view, if these employees have not quit or been discharged, they continue to retain a sufficient community of interest in the unit to warrant a finding that they are eligible to vote.⁵

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 10 days from the date of this Decision and Direction, open and count the ballots of Michael Johnson, Victor Clingen, Tim Corrin, Pedro (Patru) Dajicu, Robert Downs Jr., Nikki Higuchi, Michael Krout, Charles Ladner, and Mike Ryan and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

MEMBER COHEN, dissenting.

I would remand this proceeding to the hearing officer to resolve credibility regarding the voting eligibility of the eight challenged voters who the Employer contends are ineligible because of extended medical disabilities. My colleagues conclude that the presumption of eligibility of an employee on sick or disability leave is rebutted only by an affirmative showing that the employee has resigned or has been discharged. Concededly, there are Board cases that support that view. See *Red Arrow Freight Lines*, 278 NLRB 965 fn. 4 (1986), and cases cited therein. However, I respectfully disagree with those cases. In my view, the real issue is whether the employee has a reasonable expectancy of returning to the unit.

In cases involving a laid-off employee the eligibility test is whether the employee has a reasonable expectancy of returning to the unit.¹ I do not think that a different rule should apply to an employee on sick leave. In both cases, the employees are absent from work. The fact that the one absence is for economic reasons and the other is for medical reasons is not a relevant distinction. Rather, the relevant distinction is between those who have a reasonable expectancy of return (whether because of economic or medical factors) and those who do not. That is the test that will measure whether the employees have a community of interest with the active employees. Accordingly, I would apply the "reasonable expectancy" test in both circumstances. If the employee has no such reasonable expectancy, I would find that the employee is ineligible to vote, even if the employee has not resigned and has not been discharged. See Member Babson's concurrence in *Red Arrow*, supra. The absence of a

⁵ Member Stephens notes that under *Whiting Corp.*, supra, the reasonable expectation test could be used when there was ambiguity surrounding employment status itself. See discussion in *NLRB v. Newly Weds Foods*, supra at fns. 8-9. Here, however, the Employer concedes employee status, but argues that the "reasonable expectation" test should be applied because the individuals in question are carried on its rolls as "inactive" employees.

¹ See *Red Arrow*, supra at fn. 5.

resignation and/or a discharge may be relevant to the ultimate question of whether there is a reasonable expectancy of return, but it is not dispositive of that issue.²

The court's decision in *Whiting Corp.*, 99 NLRB 117, revd. 200 F.2d 43 (7th Cir. 1952), cited by my colleagues, does not require a contrary result. The court held that the Board's test regarding disabled employees was a permissible one. The court did not suggest that the test was a required one. In further response to my colleagues, I note that an inquiry into "reasonable expectation" is often made by the Board in the context of laid-off employees, irrespective of

²For example, an employee may not wish to resign even if, objectively speaking, there is no reasonable expectancy of return. Similarly, an employer may have legitimate reasons for not taking the step of discharging the employee.

whether these persons are technically carried on the rolls as employees. I see no reason why the same inquiry cannot be made in the context of disabled employees, irrespective of whether they are technically carried on the rolls as employees.

Accordingly, I would remand for a determination of whether the employees in question had a reasonable expectancy of return.³

³I agree that the challenging party has the burden of proving the ineligibility. Here, the hearing officer specifically declined to resolve credibility of the Employer's expert witnesses who testified that the challenged voters would never return to work at Vanalco.

Under my test, Mac Johnson may turn out to be ineligible to vote, and yet he voted. However, the Employer could have challenged him but did not do so. The Employer's objection on this basis is a post-election challenge, and I would not permit it. See *Babcock & Wilcox Co.*, 118 NLRB 944 (1957).